Neutral Citation Number: [2024] EWCA Crim 1597

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES
HHJ Lodder KC
T2024/0004
AND ON APPEAL FROM THE CENTRAL CRIMINAL COURT
RECORDER OF LONDON
T2023/0596

Case No: 202402463 B4
Case No: 202402574 B1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 December 2024

Before:

LADY CHIEF JUSTICE OF ENGLAND AND WALES
(Baroness Carr of Walton-on-the-Hill)
LORD JUSTICE EDIS
and
MR JUSTICE MURRAY

- -

Between:

ABJ	**Applicant**
- and -	
REX	**Respondent**
(First Application)	
BDN	**Applicant**
- and -	
REX	**Respondent**
(Second Application)	

- -

- -

Michael Mansfield KC and Owen Greenhall (instructed by **Hodge Jones & Allen)** for **ABJ**
Louis Mably KC and Michael Bisgrove (instructed by The **Crown Prosecution Service**) for the **Respondent**.

(First Application)

- and -

Henry Blaxland KC and Jacob Bindman (instructed by **Vajahat Sharif)** for **BDN**
Louis Mably KC and **Diana Wilson** (instructed by **The Crown Prosecution Service**) for the **Respondent**

(Second Application)

Hearing date: 27 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 24 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Note – The provisions of section 37 of the Criminal Procedure and Investigation Act 1996 apply to the proceedings in the preparatory hearings in these cases. No order has been made in the Crown Court that section 37(1) shall not apply. An order is now made that section 37(1) shall not apply to this judgment. Unless and until any further order is made, only this judgment, and those particulars identified in section 37(9) of the 1996 Act may be reported until the conclusion of both sets of proceedings in the Crown Court .

The Baroness Carr of Walton-on-the-Hill, CJ:

Introduction

1. We have before us two applications concerning the ingredients of the offence under s. 12(1A) of the Terrorism Act 2000 (as amended by the Terrorism Act 2006) (s. 12(1A)) (the TA), including whether the offence is compatible with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10) (ECHR). Both applicants are the subject of prosecutions under s. 12(1A).

2. In the case of ABJ, the applicant is alleged to have expressed a belief or opinion supportive of a proscribed organisation, Harakat al-Muqawama al-Islamiyya (Hamas). At a preparatory hearing in the Crown Court at Kingston, HHJ Lodder KC ruled:

   i) The offence does not require proof that the defendant was aware of the fact that the organisation in question was proscribed;

   ii) Proof of the ingredients of the offence is of itself sufficient to ensure that a conviction is a proportionate interference with a defendant's Article 10 rights. No proportionality direction to the jury is required.

3. In the case of BDN, the applicant is alleged to have expressed a belief or opinion supportive of Hamas. At a preparatory hearing in the Central London Criminal Court the Recorder of London, HHJ Lucraft KC, also ruled that proof of the ingredients of the offence is of itself sufficient to ensure that a conviction is a proportionate interference with a defendant's rights under Article 10 (and dismissed a challenge under Article 7 of the ECHR (Article 7)).

4. For ABJ, Mr Mansfield KC submits, in summary, i) that the judge ought to have concluded that the prosecution was required to prove awareness of the fact of proscription; and ii) that the judge ought to have ruled that the jury should be directed to carry out a freestanding proportionality assessment under Article 10 as a "stand-alone" defence, coupled with a direction that the words of s. 12(1A) should be given a "heightened" meaning, including as to "recklessness".

5. For BDN, Mr Blaxland KC submits, in summary, that the offence is incompatible with both Articles 7 and 10, such that the court should make a declaration of incompatibility under s. 4(2) of the Human Rights Act 1998 (the HRA). Alternatively, the provision should be read in a way which is compatible. Although a declaration of incompatibility is the applicant's preferred outcome, the issues must be decided in reverse order: a declaration of incompatibility could only be made if the court, applying s. 3 of the HRA, is unable to construe the provision in a manner compatible with the relevant Convention rights. As with ABJ, it is argued for BDN that the judge should not have ruled that proof of the elements of the offence alone was sufficient to ensure that conviction was a proportionate interference with BDN's Article 10 rights. It is said that, in order to achieve compatibility with Article 10, the jury required specific directions concerning the approach to proof of elements of the offence: an assessment of free speech when considering recklessness, and a "heightened" meaning for the elements of the offence. In contrast to ABJ's position, it is accepted for BDN that it is not necessary for the

prosecution to prove that a defendant was aware that the organisation in question was proscribed.

6. Mr Mably KC for the respondent contends that the judges below reached the correct conclusions, including by reference to the previous decisions in *R v Choudary and another* [2016] EWCA Crim 61; [2018] 1 WLR 695 (*Choudary*) and *Pwr v Director of Public Prosecutions* [2022] UKSC 2; [2022] 1 WLR 789 (*Pwr*).

7. The applicants seek leave to appeal the rulings under s. 35(1) of the Criminal Procedure and Investigations Act 1996. We grant leave. Further, it is in the public interest that this decision is published without delay. We therefore direct that s. 37(1) of the Criminal Procedure and Investigations Act 1996 shall not apply to this judgment. The facts of the cases are immaterial to our decision and we say nothing more about them. The restriction will continue to apply to the decisions of the judges in the Crown Court.

The TA and s. 12(1A)

8. The TA replaced the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provisions) Act 1996. Its purpose is to provide the measures considered by Parliament to be necessary to prevent political or paramilitary violence and thereby protect the citizens of the United Kingdom, and to enable a democratic society to operate without fear. It also contains measures designed to prevent the United Kingdom from being used for the purpose of terrorism outside the jurisdiction, terrorism being particularly difficult to counter (see *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762; [2003] 3 WLR 1153 at [14]). The TA was amended by the Terrorism Act 2006, which contains further provisions with the same purpose.

9. Part II of the TA (ss. 3 to 13) contains a regime of proscription that is integral to the measures considered by Parliament to be necessary to combat organisations concerned with terrorism. It merged the separate lists of organisations proscribed under the earlier legislation into a single proscription regime applying across the whole of the United Kingdom. Section 3 provides that an organisation is proscribed if it is listed in Schedule 2, or operates under the same name as an organisation listed in that Schedule.

10. The offences in Part II relate to membership of a proscribed organisation (s. 11); support for it (s. 12) and the wearing of uniforms etc (s. 13). They fall short of substantive acts, but inhibit activities associated with terrorist organisations, including the invitation of support for them from others. Offences under ss. 11 and 12 are triable either way offences and carry a maximum penalty of 14 years' imprisonment. The offence under s. 13 is a summary only offence with a maximum penalty of six months' imprisonment.

11. Section 12(1) provides that:

> "*A person commits an offence if*
>
> *a) he invites support for a proscribed organisation, and*
>
> b) *the support is not, or is not restricted to, the provision of money or other property…*"

12. Section 12(1A) was introduced with effect from 12 April 2019 by the Counter-Terrorism and Border Security Act 2019. The trigger for its introduction was the decision in *Choudary*, where it was held (in particular at [35] and [70]) that the offence under s. 12(1) did not prohibit the expression of views or opinions supportive of a proscribed organisation. S. 12(1A) was designed to address that gap.

13. Section 12(1A) provides:

> "*A person commits an offence if the person*
>
> *a) expresses an opinion or belief that is supportive of a proscribed organisation, and*
>
> b) *in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.*"

14. Section 13(1) provides:

> "*A person in a public place commits an offence if he*
>
> *a) wears an item of clothing, or*
>
> *b) wears, carries or displays an article,*
>
> *in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation."*

15. The offences in ss. 11 and 12 are not offences of strict liability; they require *mens rea*. Section 13, on the other hand, is an offence of strict liability (although it requires a limited mental element, in that the defendant must know that they are wearing, carrying or displaying the relevant article).

Previous authority

16. There is no previous appellate authority on s. 12(1A), but this court considered s. 12(1)(a) in detail in *Choudary*. There it was emphasised that a person could only be convicted under s. 12(1)(a) if they *knowingly* invited support for a proscribed organisation:

> "47. The criminalisation of such conduct, with the requisite intent, seems to us to fall squarely within the legislative intent and purpose of the section, and of the 2000 Act as a whole. The observations in *R v K* [2008] QB 827, 706 para 13, and in *R v G* [2010] 1 AC 43, paras 42—43 and 50, made in relation to the correct ambit of section 58 of the 2000 Act do not seem to us to take the arguments in this appeal any further.
>
> 48. It is of course important, as we have said, that someone can only be convicted of an offence under section 12(1)(a) if they knowingly invite support for an organisation that is proscribed. The Crown must therefore make the jury sure (i) that the organisation was a proscribed organisation within the meaning of the 2000 Act; (ii) that the defendant used words which in fact invited support for that

proscribed organisation; and (iii) that the defendant knew at the time he did so that he was inviting support for that organisation.

49. As the judge was also careful to emphasise, there must be proof of an invitation of support *for the proscribed organisation*. This is to be distinguished from the (mere) expression of personal beliefs, or an invitation to someone else to share an opinion or belief, conduct that does not fall within the ambit of section 12(1)(a) offence." (emphasis in original)

17. Thus, as set out above, in order to convict, the jury had to be sure i) that the organisation was a proscribed organisation; ii) that the defendant used words which in fact invited support for that proscribed organisation; and iii) that the defendant knew at the time that they did so that they were inviting support for that organisation.

18. Further, the Supreme Court considered s. 13 in *Pwr.* It rejected the submission that there was an additional requirement for the defendant to know that the organisation in question was proscribed (at [39]):

"*…There are at least two problems with that submission. First, it appears to run counter to the principle that ignorance of the law is no excuse…Secondly, it would render the provision a virtual dead letter because it would be very difficult for the prosecution to prove a defendant's knowledge of such matters…"*

19. The Supreme Court went on to note, without criticism, the common ground in *Choudary* that there was no requirement of knowledge that the organisation was proscribed.

20. In both *Choudary* and *Pwr* the courts ruled that the ingredients of the offences themselves struck the proportionality balance for Article 10 purposes.

Ingredients of the s. 12(1A) offence

Context of proscription

21. The offences created by ss.11, 12(1) and 13 were designed to support the proscription regime and thus to inhibit the ability of terrorist organisations to operate as such. The offences restrict the rights to belong to an association, to invite support, and to dress in a way which arouses a reasonable suspicion of membership. These activities are only caught if they have the necessary connection with an organisation which has been added to the list of proscribed organisations made by order of the Secretary of State. That list is comprised in Schedule 2 to the TA. By s. 123(4) of the TA such an order may not be made unless a draft has been laid before and approved by resolution of each House of Parliament. This is the affirmative resolution procedure. The order may only be made if the Secretary of State believes that the organisation is concerned in terrorism. An organisation which is listed may apply to the Secretary of State for a "deproscription" order removing it from the list, and may appeal against a refusal to the Proscribed Organisations Appeal Commission.

22. The proscription of an organisation is a matter of law. Schedule 2 to the TA is a statutory provision which may be amended in the way just described. It is also a

transparent process, in that the result is published[1] and the information leading to proscription placed before Parliament. The list currently contains 81 international terrorist organisations proscribed under the TA, including Hamas. The proscription of Hamas was most recently extended (to include the whole of Hamas) by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2021, dated 25th November 2021, which came into force on 26th November 2021 and which states:

> "The Secretary of State makes the following Order in exercise of the power conferred by section 3(3)(c) of the Terrorism Act 2000(1).
>
> The Secretary of State believes that Harakat al Muqawama al-Islamiyya (Hamas) is concerned in terrorism."

23. In accordance with s. 123(4) of the TA, a draft of this Order was laid before Parliament and approved by resolution of each House of Parliament.

24. The entry on the Government website relating to Hamas is as follows:-

> **"Harakat al-Muqawamah al-Islamiyyah (Hamas) – Proscription extended November 2021**
>
> Hamas is a militant Islamist movement that was established in 1987, following the first Palestinian intifada. Its ideology is related to that of the Muslim Brotherhood combined with Palestinian nationalism. Its main aims are to liberate Palestine from Israeli occupation, the establishment of an Islamic state under Sharia law and the destruction of Israel (although Hamas no longer demands the destruction of Israel in its Covenant). The group operates in Israel and the Occupied Palestinian Territories. Hamas formally established Hamas IDQ[2] in 1992. Hamas IDQ was proscribed by the UK in March 2001. At the time it was HM government's assessment that there was a sufficient distinction between the so called political and military wings of Hamas, such that they should be treated as different organisations, and that only the military wing was concerned in terrorism. The government now assess that the approach of distinguishing between the various parts of Hamas is artificial. Hamas is a complex but single terrorist organisation.
>
> Hamas commits and participates in terrorism. Hamas has used indiscriminate rocket or mortar attacks, and raids against Israeli targets. During the May 2021 conflict, over 4,000 rockets were fired indiscriminately into Israel. Civilians, including 2 Israeli children, were killed as a result. Palestinian militant groups, including Hamas, frequently use incendiary balloons to launch attacks from Gaza into southern Israel. There was a spate of

[1] https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version accessed 13 December 2024.

[2] Hamas-Izz al-Din al-Qassem Brigades, a part of Hamas.

> incendiary balloon attacks from Gaza during June and July 2021, causing fires in communities in southern Israel that resulted in serious damage to property.
>
> Hamas also prepares for acts of terrorism. One incident of preparatory activity is that Hamas recently launched summer camps in Gaza which focus on training groups, including minors, to fight. This is evidence of Hamas being responsible for running terrorist training camps in the region. In a press statement, Hamas described the aim of these camps as to "ignite the embers of Jihad in the liberation generation, cultivate Islamic values and prepare the expected victory army to liberate Palestine"."

25. The proscription of an organisation attracts comment and publicity in the media and social media. It is very easy for anyone to find out whether an organisation is proscribed before becoming a member, inviting support for it, or wearing its distinctive badges and symbols.

26. The text of the explanation of the proscription of Hamas set out above illustrates the important difference between promoting aims by political means and promoting those same aims by terrorism. When it was assessed that there were separate wings of Hamas, only the military wing was proscribed. When that assessment changed, so that Hamas was assessed to be a "complex but single terrorist organisation", the whole organisation was proscribed.

27. "Terrorism" is defined in s. 1 of the TA. In summary, it means:

    i) The use or threat of action which: involves serious violence against a person; involves serious damage to property; endangers a person's life (other than that of the person committing the act); creates a serious risk to the health or safety of the public or section of the public or is designed seriously to interfere with or seriously to disrupt an electronic system;

    ii) The use or threat of such action must be designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and must be undertaken for the purpose of advancing a political, religious, racial or ideological cause.

28. The proportionality and "pressing social need" for the offences which support and enforce the proscription regime must be assessed in the context of this regime, and its purpose in the suppression of terrorism as so defined. It has not been submitted that the regime or the proscription of Hamas is disproportionate.

<u>The non-controversial elements</u>

29. The ingredients of an offence under s. 12(1A) are, on the face of the section, straightforward: a person can only be convicted if the jury is sure that i) the organisation in question is proscribed; ii) the defendant expressed an opinion or belief that is supportive of that organisation; and iii) the defendant was reckless as to whether the person to whom the expression was directed would be encouraged to support that organisation. In this context, recklessness means awareness of the risk that the

expression of opinion or belief would encourage a person to whom it was directed to support the organisation, and, in the circumstances known to the defendant, that it was objectively unreasonable for them to take that risk (see *R v G* [2003] UKHL 50; [2004] 1 AC 1034 at [41]).

30. It is also common ground between the parties that, in order to convict, the jury must be sure that the defendant knew at the time that the opinion or belief they expressed was supportive of the organisation in question. This is in line with the reasoning in *Choudary* at [48] (set out in [16] above). This requirement of knowledge may of course add little on the facts in many cases, in circumstances where the jury must already be sure that the opinion or belief expressed by the defendant is supportive.

Knowledge of proscription

31. ABJ (but not BDN) raises the question of whether knowledge of proscription of the organisation is required in order for the offence under s. 12(1A) to be committed.

32. It is submitted that the wording of the statute is ambiguous as to whether knowledge of proscription is required. Proscription is said to be not a matter of law but a matter of fact: whether the Secretary of State has designated an organisation as proscribed. The requirement for the prosecution to prove awareness of the fact of proscription is supported on the basis of general principles of criminal law: there is a presumption of a mental element for every ingredient of a criminal offence unless it can clearly be shown to be the intention of Parliament to displace it (see *Sweet v Parsley* [1970] AC 132 at 148). It is submitted that, in the context of s. 12(1A):

i) The offence is "truly criminal" and the presumption is therefore particularly strong;

ii) The presence of an express mental element of recklessness in relation to the encouragement of support does not displace the presumption;

iii) The adoption of a requirement to prove awareness of the fact of proscription does not lead to any internal inconsistency in the statute, or lead to absurd results;

iv) Nor does it defeat the object of the statute, which is to criminalise those who are knowingly reckless in encouraging others to support proscribed groups.

33. We do not repeat the essential principles, which are set out helpfully in *Pwr* at [27] to [34]. In short, the correct approach is to determine whether the presumption of *mens rea* is rebutted expressly or by necessary implication. Necessary implication is an implication that is compellingly clear. Whether that is so turns on the words used in the light of their context and the purpose of the provision in question.

34. The presumption of *mens rea* in relation to knowledge of proscription is rebutted here, because of the purpose and context of the offence-creating provision. The principle that ignorance of the law is no defence is relevant, because (as set out above at [20] to [23]), proscription is clearly a matter of law. It occurs by the amendment of an Act of Parliament by a statutory instrument made under delegated powers, but subject to the approval of the legislature. It is not necessary to rest this decision simply on that principle because of the context and purpose of the legislation. The purpose of the provisions is to deprive proscribed terrorist organisations of support, and the context is

a system where the fact of proscription is a widely publicised and easily ascertainable matter. It is also part of the context that this offence was enacted to protect national security and public safety from terrorist activity. It would undermine the utility of the provision if proof of knowledge of proscription were required, since this is easily denied. The effect of the manner in which proscription is achieved is to ensure that anyone who wishes to know whether an organisation to which they are proposing to offer support is proscribed can do so in minutes by using a search engine and a few "clicks". Further, s. 12(1A)(b) defines the mental element of the offence. Recklessness suffices; this is inconsistent with the suggested requirement that proof of knowledge of the proscribed status of the organisation is required.

35. We reject the reliance placed by ABJ on the words used by the trial judge in *Choudary* (cited at [51] in the judgment of the Court of Appeal). Holroyde J, as he then was, said this:

> "Knowing that an organisation is a prohibited organisation, he must not invite support to it from others."

36. No doubt that is true, but Holroyde J was not seeking to define all elements of the offence for all purposes. Rather, he was dealing with the particular case of Anjem Choudary, who did not suggest that he was unaware of the proscription of ISIL.

37. Our conclusion is in line with both *Pwr* and *Choudary.* Thus, we see no basis for an additional requirement in the offence under s. 12(1A) that the defendant must also know at the time of expressing a supportive belief or opinion that the organisation was proscribed.

Proportionality and Article 10

38. It is common ground that the offence under s. 12(1A) engages Article 10, namely the right to freedom of expression.

39. The right to freedom of expression is not an absolute right. Interference may be justified if it is prescribed by law, has one or more of the legitimate aims specified in Article 19(2), is necessary in a democratic society for achieving such an aim or aims (where "necessary" implies the existence of a pressing social need), and is proportionate to the legitimate aim or aims to be pursued. We adopt without repeating it the analysis of the court in *Choudary* at [66]-[71].

40. The requirement that the interference be prescribed by law is met by s. 12(1A). Further, the offence is a measure clearly directed to a number of legitimate ends: preserving national security, public safety, and the rights and freedoms of others, and the prevention of crime and disorder. The offences in Part II of the TA are essential to the proscription process: they are the means by which proscription is put into effect. They enable the State to counter and attack proscribed organisations, the influence that they have on third parties and, ultimately, the threat that they pose to society.

41. The correct approach to analysing the effect, if any, of Article 10 on a statutory offence was identified in *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 (*Re Abortion Services*) at [54] to [57]. The following questions arise:

i) Whether Article 10 is engaged. It is common ground that Article 10 is engaged;

ii) Whether the ingredients of the offence themselves strike the proportionality balance so that, if the ingredients are made out, there is no breach of ECHR rights. In such a case, the court does not have to carry out a proportionality test on the facts of the individual case (the second category);

iii) If not, whether there is a means by which the proportionality of a conviction can be ensured (for example, through the interpretative duty in s. 3 of the HRA) (the third category).

42. As set out above, both judges below concluded that the ingredients of the s. 12 (1A) offence themselves struck the proportionality balance, and fell into the second category identified in *Abortion Services*.

The appellants' submissions in summary

43. For ABJ, Mr Mansfield submits that the offence under s. 12(1A) is incompatible with Article 10 unless it is read so as to i) require a proportionality defence which would be determined by the jury; and ii) give a heightened meaning to relevant elements of the offence, including whether a risk of encouragement is unreasonable in the circumstances. It is said that the terms "support" and "person to whom it is directed" require narrow constructions. Criminalising the expression of legitimate political opinions because they are shared with a terrorist organisation violates Article 10. It is said that these are not mutually exclusive methods, and both may need to be adopted to ensure Article 10 compliance.

44. It is further contended that:

i) Neither *Choudary* nor *Pwr*, on proper analysis, provide support for a conclusion that the ingredients of the offence themselves strike the proportionality balance;

ii) Section 3 of the HRA requires primary (and subordinate) legislation to be read and given effect in a manner compatible with ECHR rights, so far as possible. Examples of a heightened meaning being given include *Connolly v DPP* [2007] EWHC 37 (at [18]);

iii) These cases fall within the third category identified in *Re Abortion Services*. First, it is for the prosecution to establish to the criminal standard that the interference with Article 10 is justified. In the Crown Court, this is a matter to be assessed by a jury (with reliance on *DPP v Ziegler and others* [2021] UKSC 23; [2022] AC 408 at [60]). Secondly, and in addition, a heightened meaning to the elements of the offence must be given (with reliance on *R v Casserly* [2024] EWCA Crim 25; [2024] 1 Cr App R 18 (*Casserly*) at [49] and [52]). The jury would need to be directed to consider the importance of free speech when considering the elements of the offence, in particular the requirement of recklessness.

45. For BDN, Mr Blaxland submits that s. 12(1A) is a disproportionate interference with the appellant's Article 10 rights because it was unnecessary for Parliament to introduce it in the first place: the mischief at which s. 12(1A) was aimed is in fact covered by s. 12(1)(a). Further, the judge was wrong to conclude that the ordinary test for subjective

recklessness (without more) was sufficient to render the conduct caught by the offence clear and unambiguous. The requirement that a defendant must foresee the risk that someone may be encouraged provides no sufficient protection against the simple criminalisation of expressions of opinion. The offence in s. 12(1A) has none of the specificity of s. 12(1), nor can it be said to be highly focussed (like the offence in s. 13). In the absence of any qualification, the offence lacks the necessary legal certainty to render it compatible with Articles 7 and 10. It is therefore incompatible with those Articles, cannot be construed so that it is, and the court should so declare.

46. As for proportionality, it is submitted that the judge failed to carry out a proper balancing exercise to determine whether the measure was necessary in a democratic society. He failed to consider the clear and consistent principles regarding interference with political speech, including a failure to consider whether less restrictive measures could have been used in the circumstances, and a failure to give any or sufficient weight to the fact that BDN's opinion occurred in an entirely peaceful context. No consideration was given to the effect of the very serious penalties available, and the effect on free speech and reputation of a serious terrorism conviction.

47. It is suggested that, as available alternatives, the question of subjective reasonableness in the test of recklessness should incorporate a consideration of the defendant's right to free expression and the fact that even offensive opinions are protected (within limits). Further, the court could adopt a "heightened meaning" approach in line with *Casserly* at [52].

Analysis

48. We do not consider that the challenge to the offence under s. 12(1A) under Article 7 adds anything material to the challenge under Article 10. The offence is created by statute and is therefore prescribed by law. If the provision survives the Article 10 challenge, then it will have the level of certainty which Article 7 requires. This was the approach taken by the Strasbourg court in *Perinçek v. Switzerland* No. 27510/08 (2015) at [289], for example. In our judgment, the same approach is appropriate in these cases.

49. We turn then to the central challenge on proportionality. As the Supreme Court did in *Pwr* at [69], we take the test from *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC700, where Lord Sumption JSC (with whose judgment the majority agreed) said this about the application of non-absolute Convention rights and judicial review (at [20]):

> "The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap . . . the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four

> requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

50. There is no doubt that the objective of this legislative provision is sufficiently important to justify the limitation of a fundamental right and that the measure is rationally connected to that objective. A less intrusive measure was first enacted in s. 12(1) of the TA, but Parliament decided that it was insufficient.

51. The enquiry therefore turns to the fourth of Lord Sumption's elements. At this stage the question of whether the measure was necessary to address a pressing social need is involved in assessing the balance which has been struck (see *Abortion Services* at [154]). The need to protect populations from terrorism is a pressing social need. It is appropriate to emphasise the importance of denying terrorist organisations support in order to inhibit their activities. A terrorist organisation is proscribed because it adopts the use of acts of terrorism. The issue concerns the balance of that pressing social need against the very important rights guaranteed by Article 10.

52. The new offence in s. 12(1A) addresses a similar type of conduct to that which is the subject of s. 12(1), albeit requiring a different mental element. In contrast to the word "invite" in s. 12(1), which imports a specific intent (see [48] of *Choudary*), the mental fault element in s. 12(1A) is recklessness. As reflected in its position within s. 12, s. 12(1A) is an extension of the criminal offence in s. 12(1). S. 12(1) has already been considered authoritatively by this court in *Choudary* and held not to be incompatible with Article 10. We need to focus on the change wrought by s. 12(1A) against that background.

53. First, it is necessary to consider the terms of s. 12(1A) itself. The expression must be of an opinion or belief that is supportive of the "organisation". To express an opinion or belief that is shared by the organisation is not the same thing as to express an opinion or belief that is supportive of the organisation. The organisation does not merely exist to promote a (terrorist) belief. It exists to promote that belief by the means identified in the definition of terrorism in s. 1 of the TA. The offence requires the expression of an opinion or belief that is supportive of Hamas, and not merely that it may be supportive of the achievement of aims which Hamas shares. That is an important distinction which will require the court deciding the case to pay careful attention to what was said and done, the circumstances in which that happened, and the meaning which the speaker intended to convey.

54. It is also essential to recognise that s. 12(1A) does not prevent a person from holding or merely expressing an opinion or belief that is supportive of a proscribed organisation. What is required in addition is expression of an opinion or belief supportive of a proscribed organisation, being at least reckless as to whether a person "to whom the expression is directed will be encouraged to support the organisation". It is not only the expression of the opinion or belief which must be proved, but the circumstances in which it is expressed must be such as to satisfy the requirements of s. 12(1A)(b).

55. Secondly, in deciding whether the proportionality is inherent in the ingredients of the offence, the court should pay appropriate respect to Parliament which has enacted the offence in primary legislation (see *Re Abortion Services* at [55]).

56. Thirdly, the new offence involves a significantly more culpable state of mind than that required by s. 13 of the TA, which is an offence of strict liability (carrying a maximum sentence of 6 months' imprisonment) and which was nevertheless found to be proportionate in *Pwr*.

57. Fourthly, the context of the offence, sitting in Part II of the TA and constituting part of the proscription regime as explained above, is critical to this assessment. There is a strong public interest in countering terrorism, including in preventing the spread of terrorist ideology though propaganda or public encouragements.

58. The reason why Parliament legislated to add s. 12(1A) to the TA appears to have been the decision in *Choudary* at [35], [47]-[49] (quoted at [16] above) and [70]. In [35] and [70] it was emphasised that s. 12(1) only prohibits the inviting of support for a proscribed organisation with the requisite intent. It does not prohibit the expression of views or opinions supportive of a proscribed organisation. Parliament's intention in introducing s. 12(1A) was to penalise culpable behaviour falling outside s. 12(1) as there identified.

59. The new offence, as we have explained, only expands the scope of the activity criminalised to a limited extent. Whereas s. 12(1) catches activity if it is carried out as a "knowing" invitation, s. 12(1A) now catches an expression of opinion or belief expressed, not knowingly, but recklessly as to its effect: the defendant must be shown to have been reckless as to whether a person to whom they have directed a statement of belief or opinion will be encouraged to support a terrorist organisation. Here the breadth of the definition of "support" adopted in *Choudary* underlines the targeted mischief. A person expressing an opinion or belief in this reckless way cannot know which kind of support the audience may be encouraged to offer. It may be tangible and practical support. Some supporters of terrorist organisations themselves become terrorists and perpetrate acts of terrorism. Once radicalised, people come under influences which may lead them to far greater criminality than those who played a part in that radicalisation could contemplate. But it may be only indirect support. It is well understood that the more persons who support a terrorist organisation, the more the organisation will have what is known as the oxygen of publicity. Intellectual support is valuable to a terrorist organisation (see *Choudary* at[46]).

60. The extension of the fault element of an offence from a requirement of specific intent to one where recklessness will suffice is significant, but not a change of such magnitude as to alter the proportionality assessment. Both knowledge and recklessness are states of mind that are criminally culpable, and recklessness often constitutes the fault element for serious offences.

61. We adopt the same approach as was adopted in *Choudary* and *Pwr*. We conclude that the offence created by s. 12(1A) is proportionate to the legitimate objective which it seeks to achieve. The Article 10 challenge therefore fails, and with it, as we have said, the Article 7 challenge.

62. We therefore consider that the judges below were right to conclude that the ingredients of the offence themselves satisfied the proportionality requirement. This means that the jury at trial will not be required or permitted to carry out an assessment of the proportionality of a criminal conviction attaching to the alleged behaviour if they find

Reporting restrictions apply, see page 2

the elements of the offence proven. There will thus be no need for a proportionality direction.

Conclusion

63. For these reasons, these appeals are dismissed, and we decline to make a declaration of incompatibility in relation to the offence created by s. 12(1A).